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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

THOMAS HUNTER,

Defendant and Appellant.

E071702

(Super.Ct.No. FSB17000253)

OPINION

APPEAL from the Superior Court of San Bernardino County. J. David Mazurek.

Affirmed as modified.

Reed Webb, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Robin Urbanski and Kristen Kinnaird Chenelia, Deputy Attorneys General, for Plaintiff and Respondent.

I

INTRODUCTION

This is defendant and appellant Thomas Hunter's second appeal following a remand and order from the Supreme Court. In his prior appeal, defendant argued (1) the trial court erred in finding true his first prior prison term allegation for his 1988 robbery conviction; (2) the trial court erred in finding true his second prior prison term allegation for his 2010 criminal threat conviction; and (3) the trial court erred in ordering one of his prior prison terms to be served concurrently. (*People v. Hunter* (May 25, 2018, E068544) [nonpub. opn] (*Hunter I*)). In an unpublished opinion, we found the second prior prison term allegation (the 2010 criminal threat conviction) had "washed out," and ordered that prior prison term allegation stricken. (*Ibid.*) We also determined that the trial court erred in imposing a concurrent term on one of the prior prison terms and remanded the matter to the trial court to either impose or strike the first prior prison term allegation (the 1988 robbery conviction). (*Ibid.*)

On remand, the trial court imposed the one-year term for the 1988 prior prison term, and defendant appealed. Defendant now argues that a five-year period free of felony convictions "washes out" all previous prior prison terms. The People concede that defendant's remaining prior prison term should be stricken because it was "washed out." We agree that the washout rule applies to the earlier 1988 prior prison term allegation for the robbery conviction and order the 1988 prior prison term stricken. We otherwise affirm the judgment.

II

PROCEDURAL BACKGROUND¹

A jury found defendant guilty of driving or taking a vehicle without the owner's consent (Veh. Code, § 10851, subd. (a)). In a bifurcated proceeding, the trial court found that defendant had suffered one prior strike conviction (Pen. Code, §§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)),² to wit, a 1980 robbery, and two prior prison terms (§ 667.5, subd. (b)), to wit, a 1988 robbery conviction and a 2010 criminal threat conviction. Defendant was sentenced to a total term of seven years in state prison with 256 days of credit for time served as follows: the upper term of three years, doubled to six years due to the prior strike for the vehicle theft conviction, plus one year for “one of the [] prior prison enhancements,” and a concurrent one year for the other prior prison term allegation. (*Hunter I, supra*, E068544, at p. 2.)

Defendant subsequently appealed. In an unpublished opinion filed on May 25, 2018, we affirmed the judgment of conviction, struck the 2010 prior prison term allegation, and remanded the matter to the trial court to either strike or impose the 1988 prior prison term allegation. (*Hunter I, supra*, E068544, at pp. 2-3, 11-12.)

On June 29, 2018, defendant filed a petition for review in the Supreme Court.

¹ We limit our recitation of the background to the procedural facts relevant to the issue raised in this appeal.

² All future statutory references are to the Penal Code unless otherwise stated.

On September 12, 2018, the Supreme Court denied defendant's petition for review "without prejudice to the filing of a petition for a writ of habeas corpus raising the question of the applicability of Penal Code section 667.5, subdivision (b) to defendant's prior prison terms. (*In re Harris* (1989) 49 Cal.3d 131, 134, fn. 2.)" In its written order, the Supreme Court concluded the key language used in section 667.5, subdivision (b), "means" defendant's 1988 prior prison term, "even though he had reoffended within a year of his discharge from parole, was nevertheless subsequently washed out." The Supreme Court explained: "If he were being sentenced before the 2011-to-2017 crime-free interim, then his 1988 prior would have supported a section 667.5, subdivision (b), enhancement. A reasonable interpretation of the statutory language should result in a ruling that no additional term may be imposed for a previously-served prison term whenever a defendant subsequently manages to avoid a felony conviction, or being returned to prison custody, for a continuous period of five consecutive years. From the language used in the washout phrase, it is evident that the Legislature decided to include an opportunity for redemption for recidivistic defendants so that no additional term shall be imposed for any and all prison terms that may precede a five-year period during which there was no commission of a new felony or a return to prison custody for a parole violation." The Supreme Court cited *People v. Warren* (2018) 24 Cal.App.5th 899 (*Warren*), which was filed on June 21, 2018, about a month after *Hunter I* was filed. The Supreme Court concluded that the petition for habeas corpus "should be granted in that he is unlawfully being restrained by the imposition of an order to serve an additional year

consecutively in state prison for a prior prison term that has been washed out under the provisions of Penal Code section 667.5, subdivision (b).”

On September 14, 2018, this court issued a remittitur from defendant’s appeal.

On October 5, 2018, the trial court resentenced defendant on remand. The court noted, “And the trial [*sic*] court has basically directed the court to strike the second prior prison term allegation, the 2010 criminal threat conviction. So that is stricken. And the matter was remanded for the trial court to impose or strike the first prior prison term enhancement.” The court concluded, “And for all the reasons the Court was imposing the prior term enhancement at the original sentencing, I again will use those same reasons and impose the prison term enhancement for an additional year with a 1988 robbery conviction. So that’s—the original sentence was 6 years plus an additional 1 year. It is again.”

On October 26, 2018, defendant filed a petition for writ of habeas corpus in the superior court as directed by the Supreme Court.

On November 21, 2018, defendant filed a notice of appeal from the trial court’s October 5, 2018 resentencing order.

On January 7, 2019, the superior court denied defendant’s petition for writ of habeas corpus, finding the court lacked “authority to grant a petition for writ of habeas corpus” as defendant had a pending appeal before this court.

III

DISCUSSION

Defendant argues that a five-year period free of felony convictions washes out all prior prison terms. In this appeal, the People concede that defendant's remaining prior prison term enhancement should be stricken because it was washed out.³ As articulated by the Supreme Court in its order denying defendant's petition for review, we agree with the parties and strike defendant's 1988 prior prison term.

Section 667.5, subdivision (b), authorizes a one-year sentence enhancement “for each prior separate prison term . . . for any felony; *provided that no additional term shall be imposed under this subdivision for any prison term . . . prior to a period of five years in which the defendant remained free of both the commission of an offense which results in a felony conviction, and prison custody[.]*” (Italics added.)

“The [italicized] phrase is commonly referred to as the ‘washout rule’ where a prior felony conviction and prison term can be ‘washed out’ or nullified for the purposes of section 667.5.” (*People v. Fielder* (2004) 114 Cal.App.4th 1221, 1229.) “According to the ‘washout’ rule, if a defendant is free from both prison custody and the commission of a new felony for any five-year period following discharge from custody or release on parole, the enhancement does not apply. [Citations.] Both prongs of the rule, lack of prison time and no commission of a crime leading to a felony conviction for a five-year

³ We note that the People did not concede any error in defendant's earlier appeal relating to the 1988 prior prison term. (See *Hunter I, supra*, E068544, at p. 2.)

period, are needed for the ‘washout’ rule to apply. This means that for the prosecution to prevent application of the ‘washout’ rule, it must show a defendant either served time in prison or committed a crime leading to a felony conviction within the pertinent five-year period. [Citations.]” (*Ibid.*, italics omitted.)

After this court issued its unpublished opinion in defendant’s prior appeal, on July 30, 2018, the California Supreme Court issued its opinion in *People v. Buycks* (2018) 5 Cal.5th 857, holding that Proposition 47 turned former prior felonies that are now legally misdemeanors into misdemeanors for all purposes. Furthermore, our colleagues in the Fifth District recently acknowledged that the literal terms of the washout provision—requiring five years free of both felony offenses and incarceration in prison—are not satisfied if the defendant served the prior prison terms, even though the underlying offenses can no longer be treated as felonies. (*Warren, supra*, 24 Cal.App.5th at p. 915; see *People v. Kelly* (2018) 28 Cal.App.5th 886.)

The *Warren* court expressly held that a subsequent five-year period of being crime free makes the section 667.5, subdivision (b) enhancement inapplicable to all prior prison terms, even those that were not immediately followed by a five-year washout. (*Warren, supra*, 24 Cal.App.5th at pp. 915-917.) Put simply, the enhancement does not apply if the defendant had an unbroken five-year period during which he was free of both felony offenses and incarceration in prison. (*Id.* at p. 915.) The five-year period starts once the defendant is released from custody. (*Id.* at p. 916.)

In *Warren, supra*, 24 Cal.App.5th 899, the defendant was first sent to prison and then released on parole in January 1993. In July 1993, the defendant was sent back to prison on a new felony conviction. (*Id.* at p. 906.) After his subsequent release from prison in February 1995, the defendant was sentenced to another term in prison three months later. A May 1997 release was followed by an October 1997 conviction and yet another prison term. That term was served until the defendant's release in 2001 followed by a 2002 felony conviction. (*Ibid.*) After 2004, the defendant sustained three more felony convictions and served prison sentences for each of them but the offenses were later reduced to misdemeanors following the passage of Proposition 47. The defendant did not commit another felony until 2015. The time between 2004 and 2015 when the defendant's felonies were reduced to misdemeanors under Proposition 47 created a washout period of at least five years. (*Warren*, at p. 906.) The court held that the redesignation to a misdemeanor of former felony offenses due to Proposition 47 relieved the defendant of all of his numerous prior prison term enhancements that he had on his record where he had failed to reach a similar five-year period. (*Id.* at p. 917.) The court concluded: "The point of the washout provision of section 667.5, subdivision (b), is to relieve defendants of the enhancements created by that subdivision in those cases in which defendants have been free of committing offenses society has deemed felonies, and receiving punishments based on such offenses, for a given period of time after being released from a prison term." (*Warren*, at p. 919.) The court disposed of the appeal by ordering "All of the one-year enhancements applied to [the defendant's] sentence,

including those that were stayed,” stricken, vacated the sentence, remanded the matter to the trial court for resentencing. (*Ibid.*)

In this case, defendant was convicted of a robbery on March 17, 1988, and served a prison term as a result of that conviction. He was paroled on February 8, 1995, but failed to remain free from prison custody. In August 1999, he was sentenced to prison for four years following a child endangerment conviction. Subsequently, he was convicted of making criminal threats and sent to prison on August 31, 2010. He was paroled on October 20, 2011, and convicted of his most recent offense on April 19, 2017, which resulted in a felony conviction, more than five years after his most recent release from prison custody. Accordingly, following his first appeal, this court struck the 2010 prior prison term. Under *Warren*, once defendant’s 2010 prior prison term was washed out, his remaining 1988 prior prison term allegation also washed out.

Based on the foregoing, we strike defendant’s earlier 1988 prior prison term allegation.

IV

DISPOSITION

The judgment is modified by striking defendant's first prior prison term allegation for the 1988 robbery conviction. The trial court is directed to prepare an amended abstract of judgment reflecting the modification, and to forward the amended abstract of judgment to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

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CODRINGTON
J.

We concur:

MILLER
Acting P. J.

FIELDS
J.